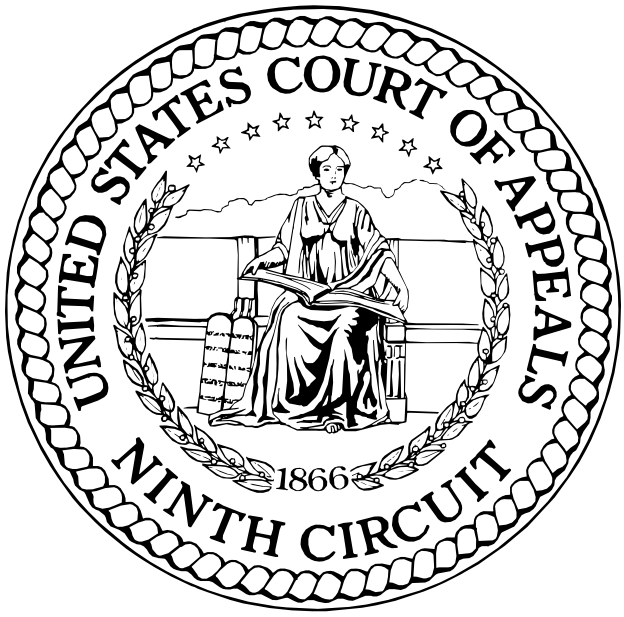
Ninth Circuit Court of Appeals
Office of Staff Attorneys



Social Security Outline

Written July 2000
Updated 2013

Office of Staff Attorneys
United States Court of Appeals for the Ninth Circuit

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This outline is not intended to express the views or opinions of the Ninth Circuit, and it may not be cited to or by the courts of this circuit.

ACKNOWLEDGMENTS

The outline was written by Dennis J. Hanna in July 2000. Many thanks to the staff attorneys and others who have reviewed sections of this outline, and have contributed valuable comments and corrections.

Introduction

This outline is provided as a resource to assist in analyzing Social Security appeals. It summarizes procedural and substantive principles relating to Social Security law in the Ninth Circuit.

As a research tool, this outline is a starting point. Only the most general citations are included. By referring to the cited case law, United States Code, and Code of Federal Regulations, you should be able to find more specific and relevant citations. You are strongly encouraged to read the cited decisions and conduct independent research as these decisions may have been withdrawn, amended, or overruled.

This outline was prepared and produced by a member of the Office of Staff Attorneys for the Ninth Circuit Court of Appeals. Please note that this outline is not intended to express the court's position and it is not an authoritative statement of the law of this circuit.

Suggestions for revisions, clarifications, or expansions of the outline are welcome and should be forwarded to the Staff Attorneys Office for the Ninth Circuit Court of Appeals.

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I. Two Programs: Social Security & Supplemental Security Income

A. Social Security Program

The Social Security Program is financed by a system of contributory social insurance, whereby employees, employers, and the self-employed contribute to special trust funds. The program provides monthly benefits to retired and disabled workers. For benefits to be paid, a worker must have sufficient earnings in covered employment to gain insured status. A worker's benefit amount is related to covered earnings averaged over a working lifetime. Monthly benefits are payable to a retired worker at age 62 or to a disabled worker at any age.

Benefits are also available for workers' eligible dependents (spouses and children) and survivors. These auxiliary and survivor beneficiaries must generally meet an age, a disability, or a child care requirement. Amounts for auxiliaries and survivors are based on a percentage of the worker's benefit.

1. Social Security Disability Insurance Benefits

This benefit is also referred to as "DI," "DIB," "SSDI," "SSDIB," or "Title II benefits." Disability Insurance Benefits are available to individuals who have worked in recent years (five out of the last 10 years in most cases) who are now disabled. Because this is not a "needs-based" benefit, it is paid regardless of a claimant's income or assets. Benefits are paid based upon an individual's Social Security earnings record. *See* 42 U.S.C. §§ 401-33; 20 C.F.R. §§ 401-404.2127.

There are also two other types of Social Security disability insurance benefits:

a. Disabled Widow's and Widower's Benefits

Disabled Widow's and Widower's Benefits are available to individuals who are at least 50 and become disabled within a certain amount of time after the death of their husband or wife. The late husband or wife must have worked enough under Social Security to be insured. *See generally* 42 U.S.C. § 402.

b. Disabled Adult Child Benefits

Disabled Adult Child Benefits are available to the children of persons who are deceased or who are drawing Social Security disability or retirement benefits.

The child must have become disabled before age 22. *See generally* 42 U.S.C. § 402.

B. Supplemental Security Income Program

The Supplemental Security Income Program is financed out of general revenues and provides a national program with uniform payment standards and eligibility requirements for the aged, blind, and disabled with limited income and resources. Because SSI is a "needs-based" program, it does not matter for SSI whether an individual has worked in the past or not. The Federal SSI payment is determined by the recipient's income, living arrangement, and marital status. A State may supplement the payment levels of all or selected categories of recipients. States may choose to administer these supplemental payments or have Social Security administer payments on their behalf.

1. Supplemental Security Income Disability Insurance

This benefit is also referred to as "SSI," "SSIDI," or "Title XVI benefits." Supplemental Security Income Disability Insurance Benefits are available to individuals who are disabled and meet certain income and asset limits. *See* 42 U.S.C. §§ 1381-83f; 20 C.F.R. §§ 416.101-416.2227.

II. Exhaustion of Administrative Remedies

All claimants must exhaust the administrative remedies set forth in 42 U.S.C. § 405(g) to invoke the district court's jurisdiction. *See Bass v. Soc. Sec. Admin.*, 872 F.2d 832, 833 (9th Cir. 1989) (per curiam). "Section 405(g) provides that a civil action may be brought only after (1) the claimant has been party to a hearing held by the Secretary, and (2) the Secretary has made a final decision on the claim." *Id.* A decision is "not final until the Appeals Council denies review or, if it accepts a case for review, issues its own findings on the merits." *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1162 (9th Cir. 2012).

A. Application for Disability Benefits

A disability examiner at the state Disability Determination agency, working with a doctor, makes the initial decision on a claimant's application. The disability examiner may request more information from the claimant, including additional medical reports and/or tests and evaluations. *See* 20 C.F.R. §§ 404.900(a)(1), 404.902-06, 404.1503, 416.903, 416.1400(a)(1), 416.1402-06.

B. Reconsideration

If the agency denies the claim initially, within 60 days after receiving notice of this determination the claimant may request "reconsideration" of the denial. The case is then sent to a different disability examiner, in the same state Disability Determination agency, for a new decision. Again, the examiner may request more information. The claimant also may submit additional materials. *See* 20 C.F.R. §§ 404.900(a)(2), 404.907-22, 416.1400(a)(2), 416.1407-22.

C. Hearing

If the agency denies the claim at reconsideration, within 60 days after receiving notice of this denial the claimant may request a hearing, and the case is sent to an Administrative Law Judge ("ALJ") who works for the Social Security Administration. The ALJ makes an independent decision on the claim. This is the only level at which the claimant and the decision maker see each other. The hearings are fairly informal. The only people likely to be there are the ALJ, an assistant operating a tape recorder, the claimant, the claimant's attorney or other representative (if the claimant is represented), and any witnesses the claimant wishes to have testify. Claimants may also submit additional evidence prior to or at the hearing. In some cases, the ALJ also has a medical doctor or vocational expert present to testify at the hearing. This is not supposed to be an adversarial hearing; there is no attorney advocating on behalf of the Social Security Administration. Many claimants, however, retain an attorney or other representative. The ALJ issues a written decision after the hearing that is mailed to the claimant. *See* 20 C.F.R. §§ 404.900(a)(3), 404.929-61, 416.1400(a)(3), 416.1429-61.

D. Appeals Council

If the ALJ denies the claim, within 60 days after receiving notice of this denial the claimant may request review by the Appeals Council, which is located in Falls Church, Virginia. The Appeals Council usually reviews a case based on the written documents in the file. The claimant, or the claimant's attorney, can submit a brief to the Council. Rarely does the Council grant requests for hearings. If the Appeals Council determines there might be merit to a claim, it normally remands the case to the ALJ to hold a new hearing in consideration of its written decision. *See* 20 C.F.R. §§ 404.900(a)(4), 404.966-82, 416.1400(a)(4), 416.1466-82.

E. Federal Court

If the Appeals Council denies review of the ALJ's decision, within 60 days after receiving notice of this denial the claimant can file an action in United States District Court, requesting review of the Social Security Administration's decision. If the claimant loses in District Court, he or she can appeal that decision to the Circuit Court of Appeals. If the claimant loses on appeal, he or she can petition for certiorari to the United States Supreme Court. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.900(a)(5), 416.1400(a)(5).

III. The ALJ's Disability Determination

A. Disability Defined

For purposes of social security disability insurance benefits, disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(a)(3)(A) (nearly identical standard for SSI); *Beltran v. Astrue*, 700 F.3d 386, 388-89 (9th Cir. 2012) (reversing district court's grant of summary judgment to Commissioner concluding that the availability of jobs in the region that claimant could do did not constitute a significant number of jobs); *Ludwig v. Astrue*, 681 F.3d 1047, 1048 n.1 (9th Cir. 2012) (affirming denial of application for disability insurance benefits); *Ukolov v. Barnhart*, 420 F.3d 1002, 1004-05 (9th Cir. 2005) (considering whether claimant established the existence of a medically determinable impairment).

B. Insured Status

To qualify for social security disability insurance benefits (*not* SSI disability Title XVI benefits), a claimant must be fully insured and have at least twenty quarters of coverage in the forty-quarter period which ends with the quarter in which the disability occurred. *See* 42 U.S.C. §§ 416(i)(3), 423(c)(1); 20 C.F.R. § 404.130(b). The requirement for disability insured status is sometimes referred to as the "currently insured" or "special insured" status requirement and has become known as the "20/40" requirement. The termination of a claimant's insured status is frequently referred to as the "date last insured" or "DLI."

See also Chapman v. Apfel, 236 F.3d 480, 482 (9th Cir. 2000) (addressing issue of whether claimant established that he had insured status); *Harvell v. Chater*, 87 F.3d 371, 372 (9th Cir. 1996) (per curiam).

C. ALJ's Duty to Develop the Record

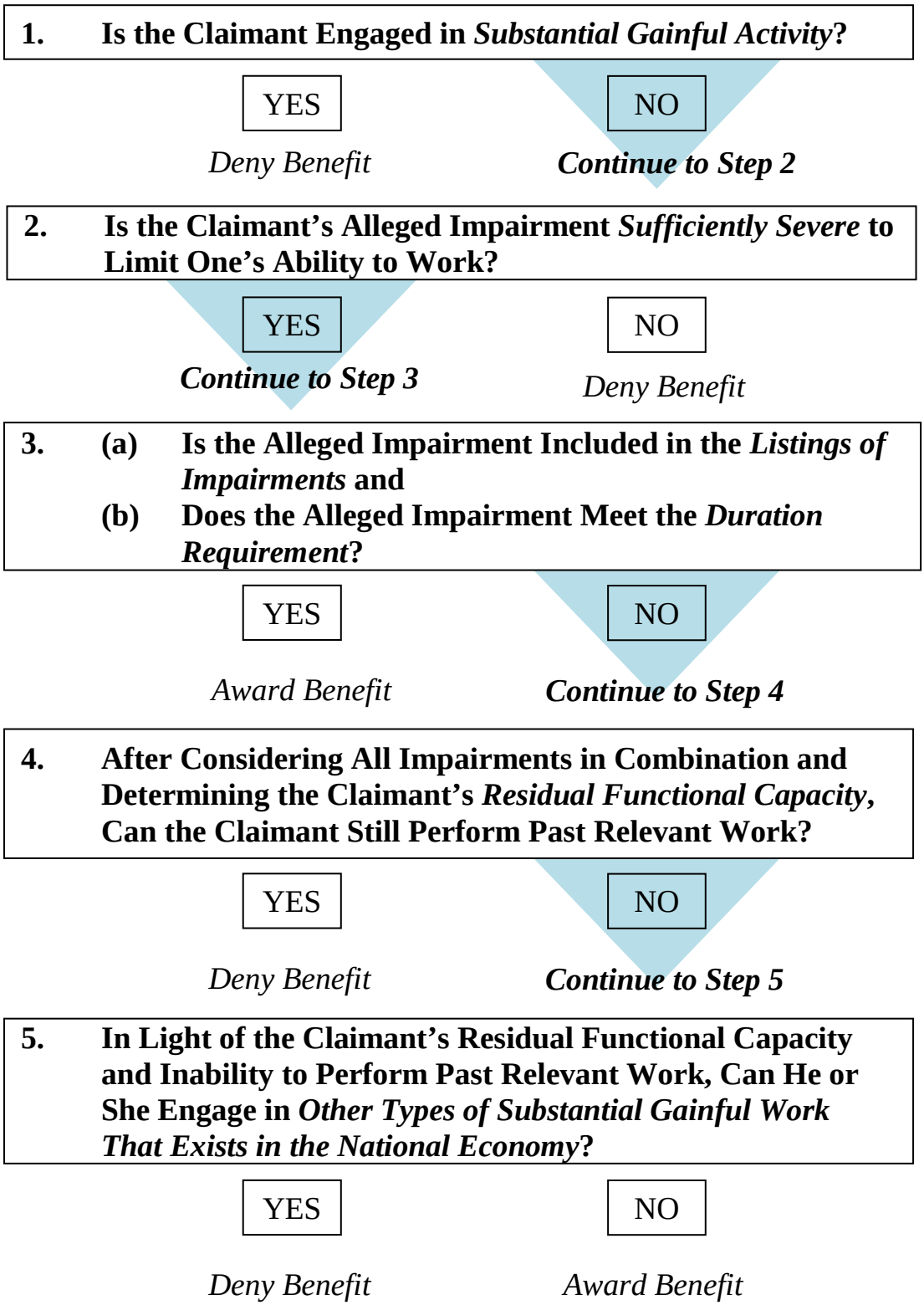
"The ALJ has a duty to develop the record . . . even when the claimant is represented by counsel." *DeLorme v. Sullivan*, 924 F.2d 841, 849 (9th Cir. 1991). When a claimant is not represented by counsel, "'it is incumbent upon the ALJ to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" *Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir. 1992) (per curiam) (quoting *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978)); *see also Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003). "If the ALJ thought he needed to know the basis of [a doctor's] opinions in order to evaluate them, he had a duty to conduct an appropriate inquiry, for example, by subpoenaing the physicians or submitting further questions to them." *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996); *see also McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011) (as amended) ("A specific finding of ambiguity or inadequacy of the record is not necessary to trigger this duty to inquire, where the record establishes ambiguity or inadequacy."); *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1999) (as amended); *Armstrong v. Comm'r of Soc. Sec. Admin.*, 160 F.3d 587, 589-90 (9th Cir. 1998) (holding that where the record is ambiguous as to the onset date of disability, the ALJ must call a medical expert to aid in determining the onset date).

D. Disability Determination (The Five-Step Sequential Evaluation)

The Commissioner is governed by a five-step sequential evaluation process for determining whether a plaintiff is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. In steps one through four, the burden is on the claimant to demonstrate a severe impairment and an inability to perform past work. At step five, if there has not yet been a determination, the burden shifts to the Commissioner to demonstrate the claimant is not disabled. *See also Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009) ("To establish eligibility for Social Security disability benefits, a claimant has the burden to prove he is disabled[,]" however the burden shifts to the Commissioner at step five to show that claimant can do other kinds of work); *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

Also see the following graphic representation of this five-step process.

Social Security Disability Determinations:
The Five-Step Sequential Evaluation


1. Is the Claimant Engaged in *Substantial Gainful Activity*?
YES
NO
Deny Benefit
Continue to Step 2
2. Is the Claimant's Alleged Impairment *Sufficiently Severe* to Limit One's Ability to Work?
YES
NO
Continue to Step 3
Deny Benefit
3. (a) Is the Alleged Impairment Included in the *Listings of Impairments* and
(b) Does the Alleged Impairment Meet the *Duration Requirement*?
YES
NO
Award Benefit
Continue to Step 4
4. After Considering All Impairments in Combination and Determining the Claimant's *Residual Functional Capacity*, Can the Claimant Still Perform Past Relevant Work?
YES
NO
Deny Benefit
Continue to Step 5
5. In Light of the Claimant's Residual Functional Capacity and Inability to Perform Past Relevant Work, Can He or She Engage in *Other Types of Substantial Gainful Work That Exists in the National Economy*?
YES
NO
Deny Benefit
Award Benefit

1. Whether the Claimant is Engaged in *Substantial Gainful Activity*.

The first step involves a determination of whether the claimant has worked since filing for benefits and whether the work is substantial gainful activity. If the claimant has engaged in substantial gainful activity, then the claimant cannot be found to be disabled, regardless of his or her medical condition, age, education, or work experience. *See* 20 C.F.R. §§ 404.1520(b), 416.920(b). The activity must be both substantial and gainful. *See* 20 C.F.R. §§ 404.1572, 416.972. If the claimant has not engaged in substantial gainful activity, the ALJ then proceeds to step two.

a. Gainfulness; Amount of Compensation

"Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized." 20 C.F.R. §§ 404.1572(b), 416.972(b). If the claimant has earned *less* than a certain minimum amount then the ALJ will generally conclude that the claimant has not engaged in substantial gainful activity. *See* 20 C.F.R. §§ 404.1574(b)(3), 416.974(b)(3). If, however, the claimant has earned *more* than that minimum amount the ALJ will generally conclude the claimant has engaged in substantial gainful activity. *See* 20 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2).

The ALJ generally considers other information in addition to the claimant's earnings if evidence suggests that the claimant is engaging in substantial gainful activity or that the claimant controls the amount and time of wage payment. This other information includes whether the claimant's work compares to that of unimpaired people in the same or similar occupations – taking into account the time, energy, skill, and responsibility involved in the work. The ALJ also determines if the claimant clearly does not receive compensation equal to the value of the work, according to the pay scales in the local community. *See* 20 C.F.R. §§ 404.1574(b)(3)(ii), 416.974(b)(3)(ii).

b. Substantiality of the Activity

"Substantial work activity is work activity that involves doing significant physical or mental activities . . . . [W]ork may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before." 20 C.F.R. §§ 404.1572(a), 416.972(a). The factors considered by the ALJ include the time spent working, quality of a person's performance, special working conditions, and the possibility of self-employment. *See Keyes v. Sullivan*, 894 F.2d 1053, 1056 (9th Cir. 1990); *see also* 20 C.F.R.

§§ 404.1573, 416.973. The amount of time spent working is only one factor considered in determining substantial gainful activity; the ALJ may find part-time work substantial. *See Keyes*, 894 F.2d at 1056; *see also* 20 C.F.R. §§ 404.1572(a), 416.972(a); *Katz v. Sec'y of Health & Human Servs.*, 972 F.2d 290, 292-94 (9th Cir. 1992) (the plaintiff's testimony that she was "extremely slow," often made mistakes, and needed help from co-workers was insufficient to rebut the presumption of substantial gainful activity where plaintiff worked 20 hours per week, work was worth amount paid, and the modifications made by the employer were relatively minor).

This court has held that "substantial gainful activity means more than merely the ability to find a job and physically perform it; it also requires the ability to hold the job for a significant period of time." *Gatliff v. Comm'r of Soc. Sec. Admin.*, 172 F.3d 690, 694 (9th Cir. 1999) (claimant's 15 years of working in jobs generally lasting no more than two months did not amount to substantial gainful activity).

c. Trial Work Period

A claimant for disability insurance benefits (*not* SSI disability Title XVI benefits) is entitled to a trial work period of up to nine months during a five-year period "during which [he or she] may test [his or her] ability to work and still be considered disabled." 20 C.F.R. §§ 404.1592; *see also* 42 U.S.C. § 422(c).

2. Whether the Claimant's Alleged Impairment is Sufficiently Severe to Limit One's Ability to Work.

The second step, "the severity step," weeds out claimants with minor problems, making them ineligible for disability benefits. Claimants must have a severe impairment, or combination of impairments, significantly limiting their physical or mental ability to do basic work activities, or they are found not disabled. *See* 20 C.F.R. §§ 404.1520(c), 416.920(c). In making this determination, the ALJ does not consider a claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1520(c), 416.920(c). If the impairment is severe, the ALJ then proceeds to step three.

A claimant's impairment, or combination of impairments, is not severe if it does not significantly limit his or her physical or mental ability to do basic work activities. Basic work activities are defined as the abilities and aptitudes necessary to do most jobs, such as (1) walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) seeing, hearing, and speaking;

(3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting. *See* 20 C.F.R. §§ 404.1521, 416.921.

To satisfy step two's requirement of a severe impairment, the claimant must prove the physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. *See* 20 C.F.R. §§ 404.1508, 416.908.

"A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities; thus, an assessment of function is inherent in the medical evaluation process itself." SSR 85-28, 1985 WL 56856 at *4 (1985) (Program Policy Statement; Titles II and XVI: Medical Impairments That Are Not Severe).[1]

The step-two inquiry is a de minimis screening device used to dispose of groundless claims. *See Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987); *see also Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005); *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). "If a claimant is unable to show that he has a medically severe impairment, he is not eligible for disability benefits. In such a case, there is no reason for the Secretary to consider the claimant's age, education, and work experience." *Bowen*, 482 U.S. at 148. An impairment or combination of

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[1] Social Security Rulings are available in the Westlaw database: FGB-SSR. While lacking the force of law, these rulings constitute the Social Security Administration's official interpretations of the statute it administers and of its own regulations. *See Molina v. Astrue*, 674 F.3d 1104, 1114 n.5 (9th Cir. 2012); *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 & n.6 (9th Cir. 1989); *see also* 20 C.F.R. § 402.35(b)(1). Social Security Rulings are entitled to some deference as long as consistent with the Social Security Act and regulations. *See Bray*, 554 F.3d at 1224 (concluding that ALJ erred in disregarding SSR 82-41); *Massachi v. Astrue*, 486 F.3d 1149, 1152 n.6 (9th Cir. 2007). These rulings are binding on ALJs. *See Molina*, 674 F.3d at 1114 n.5; *Bray*, 554 F.3d at 1224; *Quang Van Han*, 882 F.2d at 1457 n.6; *Paulson v. Bowen*, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988).

impairments can be found "not severe" only if the medical evidence clearly establishes a slight abnormality that has "no more than a minimal effect on an individual's ability to work." SSR 85-28, 1985 WL 56856 at *3 (1985); *see also Webb*, 433 F.3d at 686; *Smolen*, 80 F.3d at 1290; *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (adopting SSR 85-28);

a. Combined Effect of Multiple Impairments

It is important at this step for the ALJ to consider the combined effect of all of the claimant's impairments on his or her ability to function, without regard to whether each alone is sufficiently severe. *See Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996); *see also* 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523, 416.923; *Vasquez v. Astrue*, 572 F.3d 586, 594-97 (9th Cir. 2009) (citing 20 C.F.R. § 404.1523 when concluding that ALJ did not account for mental impairments when determining RFC).

b. Evaluations of Allegations of Pain

The ALJ is supposed to consider all symptoms, including pain, and the extent to which signs and laboratory findings confirm these symptoms. The regulations provide:

> [A claimant's] statements about [his or her] pain will not alone establish that [he or she is] disabled; there must be medical signs and laboratory findings which show that [he or she has] a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all of the other evidence (including statements about the intensity and persistence of [his or her] pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that [he or she is] disabled.

20 C.F.R. §§ 404.1529, 416.929. The ALJ evaluates the intensity and persistence of a claimant's symptoms, including pain, considering all of the available evidence, including medical history, the medical signs and laboratory findings and statements. *See id.* The ALJ then determines the extent to which the alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs, laboratory findings, and other evidence, and decides how these symptoms affect the claimant's ability to work. *See id.* Once the claimant has produced medical evidence of an

underlying impairment which is reasonably likely to be the cause of the alleged pain, medical findings are not required to support the alleged severity of pain. *See Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); *see also Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010); *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (concurrence); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007); SSR 96-7p, 1996 WL 374186 (1996) (Policy Interpretation Ruling Titles II and XVI: Evaluation of Symptoms In Disability Claims: Assessing the Credibility of an Individual's Statements); SSR 96-3p, 1996 WL 374181 (1996) (Policy Interpretation Ruling Titles II and XVI: Considering Allegations of Pain and Other Symptoms in Determining Whether a Medically Determinable Impairment is Severe).

3. Whether the Alleged Impairment (1) is Included in the Listings of Impairments and (2) Meets the Duration Requirement

At the third step, the ALJ also considers the severity of the claimant's impairment and awards benefits to the most severely impaired claimants. A claimant with an impairment which (1) meets or equals an impairment listed in Appendix I and (2) meets the duration requirement is awarded benefits. *See* 20 C.F.R. §§ 404.1520(d), 416.920(d). In making this determination, the ALJ does not consider a claimant's age, education, and work experience. *See id.* If the claimant does not satisfy the test, the ALJ then proceeds to step four.

a. The Listing of Impairments

The ALJ must determine whether a claimant's impairment meets or equals an impairment listed in "The Listing of Impairments" ("the Listings"). *See* 20 C.F.R. Part 404, Subpt. P, App. 1. The Listings describe specific impairments of each of the major body systems which are considered "severe enough to prevent a person from doing any gainful activity, regardless of his or her age, education, or work experience." *See* 20 C.F.R. §§ 404.1525(a), 416.925(a). Most of these impairments are "permanent or expected to result in death." 20 C.F.R. §§ 404.1525(c)(4), 416.925(c)(4). For some impairments, the evidence must show that the impairment has lasted for a specific time period. *Id.* "For all others, the evidence must show that [the] impairment(s) has lasted or can be expected to last for a continuous period of at least 12 months." *Id.* If a claimant's impairment meets or equals a listed impairment, he or she will be found disabled at step three without further inquiry. *See* 20 C.F.R. §§ 404.1520(d), 416.920(d).

The Listings describe the "the objective medical and other findings needed to satisfy the criteria of that listing." *See* 20 C.F.R. §§ 404.1525(c)(3), 416.925(c)(3). A mere diagnosis is insufficient to meet or equal a listed impairment. *See* 20 C.F.R. 404.1525(d). To meet a listed impairment, a claimant must establish that he or she "satisfies all of the criteria of that listing, including any relevant criteria in the introduction." 20 C.F.R. §§ 404.1525(c)(3), 416.925(c)(3). To equal a listed impairment, a claimant must establish symptoms, signs, and laboratory findings "at least equal in severity and duration" to the characteristics of a relevant listed impairment. If a claimant's impairment is not listed, then the impairment will be compared to listings that are "closely analogous" to the claimant's impairment. *See generally* 20 C.F.R. §§ 404.1526, 416.926 (explaining medical equivalence).

b. Multiple Impairments

If a claimant suffers from multiple impairments and none of them individually meet or equal a listed impairment, the collective findings of the claimant's impairments will be evaluated to determine whether they meet or equal the characteristics of any relevant listed impairment. *See* 20 C.F.R. §§ 404.1526(b)(3), 416.926(b)(3); *see also Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). "An ALJ is not required to discuss the combined effects of a claimant's impairments or compare them to any listing in an equivalency determination, unless the claimant presents evidence in an effort to establish equivalence." *See Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

c. Duration Requirement

The ALJ determines whether a claimant's alleged impairment meets the 12-month duration requirement. *See* 42 U.S.C. §§ 423(d)(1)(A), 416(i)(1), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505, 416.905, 404.1509, 416.909, 404.1522, 416.922 (the impairment must be one which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months). Each individual impairment must meet the duration requirement; the ALJ will not combine the duration of unrelated impairments to satisfy the duration requirement. *See* 20 C.F.R. §§ 404.1522, 416.922. Multiple impairments being considered together to meet a single impairment on the Listings must together meet the duration requirement. *Id.*

> Most of the listed impairments are permanent or expected to result in death. For some listings, we state a specific period of time for which

> [the] impairment[] will meet the listing. For all others, the evidence must show that [the] impairment[] has lasted or can be expected to last for a continuous period of at least 12 months.

20 C.F.R. §§ 404.1525(c)(4), 416.925(c)(4). Accordingly, a claimant can have a listed impairment without being presumptively disabled if the claimant's impairment is not severe enough, or if the claimant has not had it for a long enough time. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990); *see also DeLorme v. Sullivan*, 924 F.2d 841, 846-47 (9th Cir. 1991) ("an independent review of the record does not clearly demonstrate a twelve-month period during which DeLorme experienced a significant limitation of motion in the spine. Therefore, there is no twelve-month period in the record during which all the criteria in the Listing of Impairments are met.").

4. Whether, After Considering All Impairments in Combination and Determining the Claimant's *Residual Functional Capacity* ("RFC"), the Claimant Can Still Perform Past Relevant Work.

At the fourth step, the ALJ determines whether a claimant can perform his or her past relevant work. *See* 20 C.F.R. §§ 404.1520(f), 416.920(f). The ALJ reviews a claimant's residual functional capacity and the physical and mental demands of the work he or she has previously performed. *See id.*; *see also Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010). If the ALJ determines the claimant has the residual functional capacity required to perform this past work, the claimant is found not disabled. If the claimant cannot perform this past work, the ALJ then proceeds to step five.

Claimants who make it to steps four and five have survived the weeding out of various groups of claimants in steps one through three. Those who are actually working (step one), those who have only minor impairments (step two), and those who are severely impaired (step three). At steps four and five, the sequential evaluation process mirrors the statute. "An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy … ." 42 U.S.C. § 423(d)(2)(A); *see also Berry*, 622 F.3d at 1231 ("Generally, a claimant who is physically and mentally capable of performing past relevant work is not disabled, whether or not he could actually obtain employment.").

At step four, the ALJ may consider any of the claimant's daily activities that "may be seen as inconsistent with the presence of a condition which would preclude all work activity." *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990) (upholding denial of disability benefits where claimant could "take care of her personal needs, prepare easy meals, do light housework, and shop for some groceries"); *see also Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (upholding ALJ's decision to deny benefits that was based, in part, on determining claimant performed daily activities that were transferable to a work setting). The ALJ also notes any of the claimant's daily activities that "'involv[e] the performance of physical functions that are transferable to a work setting.'" *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) and concluding that claimant's activities were not transferable to a work setting); *see also Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (noting that a claimant should not be "penalized for attempting to lead [a] normal [life] in the face of [her] limitations"); *Fair*, 885 F.2d at 603 (noting that a claimant is not required to be totally disabled to be eligible for benefits and that "many home activities are not easily transferable to what may be the more grueling environment of the workplace, where it might be impossible to periodically rest or take medication").

a. Past Relevant Work

Work that a claimant performed within the last 15 years, which lasted long enough for him or her to learn to do it, and was substantial gainful activity, is considered past relevant work. *See* 20 C.F.R. §§ 404.1565(a), 416.965(a). An ALJ will frequently consult the *Dictionary of Occupational Titles* to determine the physical and mental demands of a claimant's former work. *See* SSR 82-62, 1982 WL 31386 (1982) (Program Policy Statement; Titles II and XVI: A Disability Claimant's Capacity to do Past Relevant Work, In General). The ALJ must make findings as to the physical and mental demands and the stress of the past work; these findings must be based on adequate documentation. *See id.*

b. Residual Functional Capacity ("RFC")

Simply stated, a claimant's residual functional capacity assessment is a determination of what the claimant can still do despite his or her physical, mental and other limitations. *See* 20 C.F.R. §§ 404.1545(a), 416.945(a). In determining a claimant's residual functional capacity, an ALJ must assess all the evidence (including the claimant's and others' descriptions of limitation, and medical reports) to determine what capacity the claimant has for work despite his or her

impairment(s). *See id.* The ALJ considers a claimant's ability to meet physical and mental demands, sensory requirements, and other functions. *See* 20 C.F.R.§§ 404.1545(b-d), 416.945(b-d). Social Security regulations define residual functional capacity as the "maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs." 20 C.F.R. Part 404, Subpt. P, App. 2, § 200.00(c). In evaluating whether a claimant satisfies the disability criteria, the Commissioner must evaluate the claimant's "ability to work on a sustained basis." 20 C.F.R. §§ 404.1512(a), 416.912(a).

i. Mental Impairments

In evaluating the severity of mental impairments, a special procedure must be followed at each level of administrative review. *See* 20 C.F.R. §§ 404.1520a(a), 416.920a(a). First, the ALJ evaluates a claimant's "pertinent symptoms, signs, and laboratory findings to determine whether" the claimant "has a medically determinable mental impairment(s)." 20 C.F.R. §§ 404.1520a(b), 416.920a(b); *see also* 20 C.F.R. §§ 404.1508, 416.908. The ALJ must also "specify the symptoms, signs, and laboratory findings that substantiate the presence of [each determined] impairment and document [the] findings." 20 C.F.R. §§ 404.1520a(b)(1), 416.920a(b)(1). Next, the ALJ rates "the degree of functional limitation resulting from [claimant's] impairment." 20 C.F.R. §§ 404.1520a(b)(2), 416.920a(b)(2). Rating the degree of functional limitation is a highly individualized process that requires the ALJ to consider all relevant evidence to determine the extent to which a claimant's impairment interferes with his or her "ability to function independently, appropriately, effectively, and on a sustained basis." 20 C.F.R. §§ 404.1520a(c), 416.920a(c). The ALJ uses a point scale to rate four broad functional areas (activities of daily living, social functioning, a concentration category, and episodes of decompensation) and the degree to which the claimant's impairment interferes with each broad functional area. *Id.*; *see also Hoopai v. Astrue*, 499 F.3d 1071, 1077-78 (9th Cir. 2007) ("[T]he ALJ is required to rate the degree of functional limitations in four areas . . . . The ALJ clearly met this requirement by rating and assessing [claimant's] limitations in each of these four functional areas. The ALJ was not required to make any more specific findings of the claimant's functional limitations."). The ALJ then must determine the severity of the mental impairment. *See* 20 C.F.R. §§ 404.1520a(d), 416.920a(d). Lastly, the ALJ must provide the proper documentation. At the initial or reconsideration levels of the administrative review process, this involves the completion of a standard document to record how the administration applied

the technique. *See* 20 C.F.R. §§ 404.1520a(e), 416.920a(e). The written decision of any later review must also "document application of the technique." *See id.*

c. Ability to Return to Previous Work

A claimant has the ability to return to previous work if he or she can perform the "'actual functional demands and job duties of a particular past relevant job'" or "'[t]he functional demands and job duties of the [past] occupation as generally required by employers throughout the national economy.'" *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (quoting SSR 82-61, 1982 WL 31387 (1981) (Titles II and XVI: Past Relevant Work – The Particular Job or the Occupation as Generally Performed)).

This inquiry, as to whether a claimant may perform his past relevant work, does not require the use of vocational testimony. *See Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996). If a claimant has the residual functional capacity to do his or her previous work (the usual work or other applicable past work), the ALJ will determine that the claimant is not disabled. *See* 20 C.F.R. §§ 404.1560(b)(3), 416.960(b)(3).

5. Whether the Claimant, in Light of His or Her Residual Functional Capacity and Inability to Perform Past Relevant Work, Can Engage in Other Types of Substantial Gainful Work That Exists in the National Economy.

At the fifth step, the burden shifts to the Social Security Administration to demonstrate that the claimant is not disabled and that he or she can engage in some type of substantial gainful activity that exists in "significant numbers" in the national economy. The ALJ considers the fact that the claimant cannot do any work that he or she has done in the past because of a severe impairment, considers the claimant's residual functional capacity, the claimant's age, education, and work experience, and determines whether the claimant can do any other work in the national economy. The ALJ will find the claimant disabled if he or she determines the claimant unable to adjust to any other work. *See* 20 C.F.R. §§ 404.1520(g), 416.920(g). *See also Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (where claimant establishes that she suffers from a severe impairment that prevents her from doing past work, burden shifts to the Commissioner to show that she can perform some other work); *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009) (the burden shifts to Commissioner at step five to show the claimant can do other kinds of work).

The step five analysis includes a detailed assessment of the medical evidence, the claimant's daily activities, prior work record, any functional restrictions and limitations, medication and other treatment for relief of symptoms, and information and observations by treating and examining physicians and third parties regarding the nature and extent of the claimant's symptoms. *See* 20 C.F.R. §§ 404.1529, 416.929. Credibility determinations are the province of the ALJ; however, the ALJ must make specific findings which support a conclusion that claimant's allegations of severity are not credible. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007); *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

a. Medical-Vocational Guidelines (Grids)

The Medical-Vocational Guidelines are a matrix system for handling claims that involve substantially uniform levels of impairment. *See* 20 C.F.R. Part 404, Subpt. P, App. 2. These guidelines are commonly known as the grids or tables that give a finding of disabled or not disabled for various combinations of age, education, and work experience. The grids provide a uniform conclusion about the availability of jobs for all persons whose medical condition is categorized in the same way. *See id.*

The grids categorize jobs by their physical-exertional requirements and consist of three separate tables, one table for each category (sedentary work, light work, and medium work). *See* 20 C.F.R. Part 404, Subpt. P, App. 2, § 200.00. If a claimant is found able to work the full range of heavy work this "generally is sufficient for a finding of not disabled." 20 C.F.R. Part 404, Subpt. P, App. 2, § 204.00. Each grid presents various combinations of factors relevant to a claimant's ability to find work. The factors in the grids are the claimant's age, education, and work experience. For each combination of these factors, *e.g.*, fifty years old, limited education, and unskilled work experience, the grids direct a finding of either disabled or not disabled based on the number of jobs in the national economy in that category of physical-exertional requirements. *See* 20 C.F.R. Part 404, Subpt. P, App. 2, § 200.00. This approach allows the Commissioner to streamline the administrative process and encourages uniform treatment of claims. *See Heckler v. Campbell*, 461 U.S. 458, 460-62 (1983) (discussing the creation and purpose of the grids). ***NOTE:*** As used in the grids, the word "do" means "ditto" or "same as above."

"For purposes of applying the grids, there are three age categories: younger person (under age 50), person closely approaching advanced age (age 50-54), and

person of advanced age (age 55 or older)." *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). The ALJ is not required to use an older age category, even if the claimant is within a few days or a few months of reaching an older age category. *Id.* Rather, the regulations only require that the ALJ consider whether to use the older age category. *Id.*

i. Grids Not Appropriate for Non-Exertional Limitations

The grids, however, may be used only where they "completely and accurately represent a claimant's limitations." *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999); *see Lounsburry v. Barnhart*, 468 F.3d 1111, 1115 (9th Cir. 2006) (quoting *Tackett*, 180 F.3d at 1103); *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985). Accordingly, if a claimant suffers from non-exertional limitations, the ALJ may not apply the grids because they are based on strength factors only. *See* 20 C.F.R. Part 404, Subpt. P, App. 2, § 200.00(e); *see also* 20 C.F.R. §§ 404.1569a; 416.969a (defining non-exertional limitations as limitations that do not directly affect a claimant's [muscular] strength). "Application of the grids is not discretionary" where the claimant suffers only exertional limitations. *Lounsburry*, 468 F.3d at 1115. If claimant's limitations are only exertional, the ALJ must apply the grid. *See id.* If claimant's limitations are only non-exertional, "the grids are inappropriate, and the ALJ must rely on other evidence." *Id.* If claimant's limitations are both exertional and non-exertional, the "ALJ must consult the grids first." *See id.* If the person "is 'disabled' under the grids, there is no need to examine the effect of the non-exertional limitations. But if the same person is not disabled under the grids, the non-exertional limitations must be examined separately." *Id*. at 1116. *See also Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576-77 (9th Cir. 1988) (noting that a sufficiently severe, non-exertional impairment may limit a claimant's functional capacity in ways not contemplated by the guidelines, rendering the guidelines inapplicable and noting that pain, postural limitations, or environmental limitations are examples of non-exertional limitations).

ii. Physical Exertion Requirements

The physical exertion requirements are commonly referred to and relied on. *See* 20 C.F.R. §§ 404.1567(a-e), 416.967(a-e).

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. *See* 20 C.F.R. §§ 404.1567(a), 416.967(a).

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b).

Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. *See* 20 C.F.R. §§ 404.1567(c), 416.967(c).

Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. *See* 20 C.F.R. §§ 404.1567(d), 416.967(d).

Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. *See* 20 C.F.R. §§ 404.1567(e), 416.967(e).

b. Vocational Expert ("VE")

In cases where the Guidelines are "not fully applicable," the ALJ may meet his burden under step five by propounding to a vocational expert a hypothetical that is based on medical assumptions supported by substantial evidence in the record and that reflects all the claimant's limitations. *See Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995); *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989); *see also Valentine v. Comm'r of Soc. Sec. Admin*., 574 F.3d 685, 690 (9th Cir. 2009) (a hypothetical that fails to take into account a claimant's limitations is defective); *Bray v. Comm'r of Soc. Sec. Admin*., 554 F.3d 1219, 1228-29 (9th Cir. 2009); *Widmark v. Barnhart*, 454 F.3d 1063, 1069-70 (9th Cir. 2006). The ALJ's depiction of the claimant's impairments must be "accurate, detailed, and supported by the medical record." *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999). An ALJ posing a hypothetical question to a vocational expert "must include 'all of the claimant's functional limitations, both physical and mental' supported by the record." *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002) (quoting *Flores v.*

Shalala, 49 F.3d 562, 570-71 (9th Cir. 1995)); *see also Valentine*, 574 F.3d at 690; *Magallanes*, 881 F.2d at 756. It is, however, proper for an ALJ to limit a hypothetical to only those restrictions that are supported by substantial evidence in the record. *See Magallanes*, 881 F.2d at 756-57. An ALJ "need not include all claimed impairments in his hypotheticals, [but] he must make specific findings explaining his rationale for disbelieving any of the claimant's subjective complaints not included in the hypothetical." *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997). These restrictions on hypothetical questions apply to the hypothetical on which the ALJ bases his findings. *See Lewis v. Apfel*, 236 F.3d 503, 517-18 (9th Cir. 2001) (finding improper the ALJ's reliance on the VE's response to a hypothetical question that did not include all of claimant's impairments, even though another hypothetical question the ALJ asked *had* accounted for all of claimant's impairments).

By responding to hypothetical questions, the vocational expert testifies as to: (1) what jobs the claimant would be able to perform; and (2) the availability of such jobs in the national economy. *See Tackett*, 180 F.3d at 1101. If there are significant numbers of jobs either in the region where the claimant lives or in several other regions of the country, then the claimant is not disabled. *See* 20 C.F.R. §§ 404.1566, 416.966; *see also Burkhart v. Bowen*, 856 F.2d 1335, 1340 (9th Cir. 1988) (holding that the vocational expert must identify specific jobs within the claimant's capabilities). If there are no jobs claimant could perform, or if such jobs do not exist in sufficient numbers, then claimant is "disabled." *See Tackett*, 180 F.3d at 1101. *See also Beltran v. Astrue*, 700 F.3d 386, 388-89 (9th Cir. 2012) (reversing district court's grant of summary judgment to Commissioner concluding that the availability of jobs in the region that claimant could do did not constitute a significant number of jobs).

It is inappropriate for a vocational expert to conclude that a claimant can transfer to a different job in a wholly different industry that requires more than the minimal adjustment contemplated under the regulation. *See Renner v. Heckler*, 786 F.2d 1421, 1424 (9th Cir. 1986) (vocational expert failed to demonstrate that the claimant would be able to perform the jobs identified with very little, if any, vocational adjustment because "[e]ach of these jobs appears to require some adjustment to new industries and work settings"); *see also* 20 C.F.R. §§ 404.1563, 416.963.

"If the assumptions in the hypothetical are not supported by the record, the opinion of the vocational expert that claimant has a residual working capacity has no evidentiary value." *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984).

"To qualify as substantial evidence, the testimony of a vocational expert must be reliable in light of the medical evidence." *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985). "If a vocational expert's hypothetical does not reflect all the claimant's limitations, then the expert's testimony has no evidentiary value to support a finding that the claimant can perform jobs in the national economy." *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (internal quotes and citation omitted).

Before an ALJ can rely on the testimony of a vocational expert, the ALJ must first inquire as to whether there exists a conflict between the expert's testimony and the *Dictionary of Occupational Titles*. *See Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th Cir. 2007). "Although evidence provided by a vocational expert generally should be consistent with the *Dictionary of Occupational Titles*, neither the *Dictionary of Occupational Titles* nor the vocational expert evidence automatically trumps when there is a conflict." *Id.* If the ALJ determines a conflict exists, "the ALJ must then determine whether the vocational expert's explanation for the conflict is reasonable and whether a basis exists for relying on the expert rather than the *Dictionary of Occupational Titles*." *Id.*

E. Medical Opinions as Evidence

There are three types of medical opinions (treating, examining, and nonexamining) and each type is accorded different weight. *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692 (9th Cir. 2009); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996). Generally, more weight is given to the opinion of a treating source than the opinion of a doctor who did not treat the claimant. *See Turner v. Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1222 (9th Cir. 2010); *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987). Medical opinions and conclusions of treating physicians are accorded special weight because these physicians are in a unique position to know claimants as individuals, and because the continuity of their dealings with claimants enhances their ability to assess the claimants' problems. *See Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988); *Winans*, 853 F.2d at 647; *see also Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) ("A treating physician's opinion is entitled to 'substantial weight.'"). Also, this court "afford[s] greater weight to a treating physician's opinion because 'he is employed to cure and has a greater opportunity to know and observe the patient as an individual.'" *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987)). In addition, more weight is given to the opinion of an examining source than to a nonexamining source. *See Lester*, 81 F.3d at 830-31; *Pitzer v. Sullivan*, 908 F.2d 502, 506 & n.4 (9th Cir. 1990). "The ALJ must consider all

medical opinion evidence." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citing 20 C.F.R. § 404.1527(b)). Note that a social worker is not considered an acceptable medical source under the regulations. *See Turner*, 613 F.3d at 1223-24.

1. Rejecting Uncontroverted Sources (requires *clear and convincing reasons*)

a. Opinions

If a treating doctor's opinion is not contradicted by another doctor (*i.e.*, there are no other opinions from examining or nonexamining sources), it may be rejected only for "clear and convincing" reasons supported by substantial evidence in the record. *See Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1198 (9th Cir. 2008); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Treating physicians' subjective judgments are important, and "properly play a part in their medical evaluations." *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988).

The ALJ accords "controlling weight" to a treating doctor's opinion where medically-approved, diagnostic techniques support the opinion and the opinion is not inconsistent with other substantial evidence. *See* 20 C.F.R. § 404.1527(d)(2); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 n.10 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 632-33 (9th Cir. 2007). If the opinion is not accorded controlling weight, then the ALJ looks to a number of other factors in determining how much weight to give it. These factors include the length of the treatment relationship, frequency of examination, nature and extent of treatment relationship, evidence supporting the treating doctor's opinion, consistency of the opinion, and the doctor's specialization. *See* 20 C.F.R. § 404.1527(d)(2)-(d)(6).

b. Conclusions of Disability

Treating physicians' uncontroverted "ultimate conclusions . . . must be given substantial weight; they cannot be disregarded unless clear and convincing reasons for doing so exist and are set forth in proper detail." *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988). Although the ALJ "'is not bound by the uncontroverted opinions of the claimant's physicians on the ultimate issue of disability, . . . he cannot reject them without presenting clear and convincing reasons for doing so.'" *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993) (quoting *Montijo v. Sec'y of Health & Human Servs.*, 729 F.2d 599, 601 (9th Cir. 1984) (per curiam)); *see also Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (stating that "reasons for rejecting a treating doctor's credible opinion on disability are comparable to those

required for rejecting a treating doctor's medical opinion"); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). "Particularly in a case where the medical opinions of the physicians differ so markedly from the ALJ's, it is incumbent on the ALJ to provide detailed, reasoned, and legitimate rationales for disregarding the physicians' findings." *Embrey*, 849 F.2d at 422. "[A]n ALJ cannot avoid these requirements simply by not mentioning the treating physician's opinion and making findings contrary to it." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 n.10 (9th Cir. 2007).

"When an examining physician relies on the same clinical findings as a treating physician, but differs only in his or her conclusions, the conclusions of the examining physician are not 'substantial evidence.'" *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007).

2. Rejecting Controverted Sources (requires *specific and legitimate reasons*)

If the ALJ rejects a treating or examining physician's opinion that is contradicted by another doctor, he must provide specific, legitimate reasons based on substantial evidence in the record. *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692 (9th Cir. 2009); *Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1198 (9th Cir. 2008); *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007); *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983); *see also* 20 C.F.R. §404.1527(d)(2).

The law is clear in this circuit that the ALJ must defer to the treating doctor's opinion, even if controverted by another doctor, unless the ALJ makes findings setting forth specific, legitimate reasons for rejecting it that are based on substantial evidence in the record. *See Turner v. Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1222 (9th Cir. 2010); *Valentine*, 574 F.3d at 692; *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (also explaining that the "ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings." (internal quotation marks and citation omitted)); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989); *see also Orn*, 495 F.3d at 632. "The ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Magallanes*, 881 F.2d at 751 (internal quotation marks and citation omitted). The ALJ's personal observations of the claimant at the hearing do not constitute a substantial

reason for rejecting the opinions of a treating physician when the claimant professes psychological impairment. *See Montijo v. Sec'y of Health & Human Servs*., 729 F.2d 599, 602 (9th Cir. 1984) (per curiam). "The ALJ must do more than offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988). "When an examining physician relies on the same clinical findings as a treating physician, but differs only in his or her conclusions, the conclusions of the examining physician are not 'substantial evidence.'" *Orn*, 495 F.3d at 632.

3. Relying on Nonexamining Medical Advisor

The ALJ must also give specific, legitimate reasons based on substantial evidence for rejecting the opinion of a treating or examining physician based in part on the testimony of a nonexamining medical advisor. *See Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Magallanes v. Bowen*, 881 F.2d 747, 752-53 (9th Cir. 1989). Note that "[t]he opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician *or* a treating physician." *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1995); *see also Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1202 (9th Cir. 2008).

4. VA Determination of Disability

A VA determination of disability is ordinarily entitled to great weight. *Berry v. Astrue*, 622 F.3d 1228, 1236 (9th Cir. 2010); *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694-95 (9th Cir. 2009); *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). However, an ALJ may give less weight to the VA's decision if the ALJ provides "persuasive, specific, valid reasons for doing so that are supported by the record." *Berry*, 622 F.3d at 1236; *Valentine*, 574 F.3d at 694-95; *McCartey*, 298 F.3d at 1076; *see also Turner v Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1225 (9th Cir. 2010).

F. Credibility Determinations

This circuit has consistently held that "questions of credibility and resolution of conflicts in the testimony are functions solely of the Secretary." *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (internal quotation marks and citation omitted); *see also Allen v. Heckler*, 749 F.2d 577, 580 n.1 (9th Cir. 1985). "The ALJ is responsible for determining credibility and resolving conflicts in medical testimony." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989); *see*

also Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). Although the ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities, *see Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995), the ALJ's credibility findings must be supported by specific, cogent reasons, *see Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006); *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990).

1. Assessing Claimant's Credibility in Pain Testimony

"In evaluating the credibility of a claimant's testimony regarding subjective pain, an ALJ must engage in a two-step analysis." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009); *see also Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012). "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (internal quotation marks and citation omitted); *see also Molina*, 674 F.3d at 1112; *Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010) ("Once the claimant produces medical evidence of an underlying impairment, the Commissioner may not discredit the claimant's testimony as to subjective symptoms merely because they are unsupported by objective evidence." (internal quotation marks and citation omitted)). "Second, if the claimant meets this first test, and there is no evidence of malingering, the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so." *Lingenfelter*, 504 F.3d at 1036 (internal quotation marks and citation omitted); *see also Molina*, 674 F.3d at 1112; *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009); *Vasquez*, 572 F.3d at 591-93 (concluding that ALJ failed to provide "specific, clear, and convincing" reasons to support adverse credibility determination); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *see also Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Berry*, 622 F.3d at 1234 (internal quotation marks and citation omitted); *see also Lester*, 81 F.3d at 834; *Dodrill*, 12 F.3d at 918.

In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains. *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)

(citations omitted). *See also Turner v Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1224 n.3 (9th Cir. 2010); *Valentine*, 574 F.3d at 693 ("[T]the ALJ provided clear and convincing reasons to reject [the claimant's] subjective complaint testimony.").

G. Other Considerations

1. Social Security "Disability" and ADA "Disability"

The Supreme Court has emphasized the fact that an Americans with Disabilities Act ("ADA") claim of ability to work with accommodation does not necessarily clash with a disability claim assertion of inability to do substantial gainful work in the national economy. *See Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 800-04 (1999); *see also Fredenburg v. Contra Costa Cnty. Dep't of Health Servs.*, 172 F.3d 1176, 1179 (9th Cir. 1999); *Johnson v. Oregon*, 141 F.3d 1361, 1367 (9th Cir. 1998).

"It is possible, due to the different definitions of disability employed by various agencies, to qualify for disability benefits and to satisfy the ADA's definition of a qualified person with a disability. The distinct purposes of the ADA, Social Security, and disability insurance inform the different definitions of disability employed." *Johnson*, 141 F.3d at 1366. "Thus, neither application for nor receipt of disability benefits automatically bars a claimant from establishing that she is a qualified person with a disability under the ADA." *Id*. at 1367. Claimants' factual statements on prior disability benefits applications are not irrelevant to ADA cases as such representations constitute useful evidence. *See id*. at 1368-69. "'Straightforward summary judgment analysis, rather than theories of [judicial] estoppel' will be appropriate in most cases." *Id*. at 1369 (quoting *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382-83 (6th Cir. 1998)).

2. Alcoholism and Drug Abuse

In determining whether a claimant's alcoholism or drug addiction is material under 42 U.S.C. § 423(d)(2)(C), the test is whether an individual would still be found disabled if he or she stopped using alcohol or drugs. *See* 20 C.F.R. §§ 404.1535(b), 416.935(b); *Parra v. Astrue*, 481 F.3d 742, 746-47 (9th Cir. 2007); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). A claimant will not be deemed "disabled" if alcoholism is a "contributing factor material to the Commissioner's determination of disability." 42 U.S.C. § 423(d)(2)(C). "In making this determination, [the Commissioner] will evaluate which of [the claimant's] current physical and mental limitations . . . would remain if [the

claimant] stopped using drugs or alcohol and then determine whether any or all of [the claimant's] remaining limitations would be disabling." 20 C.F.R. §§ 404.1535(b)(2), 416.935(b)(2). If the Commissioner determines that the claimant's remaining limitations would not be disabling, then the Commissioner finds that the claimant's drug addiction or alcoholism is a contributing factor material to the determination of disability. *See* 20 C.F.R. §§ 404.1535(b)(2)(i), 416.935(b)(2)(i). If the Commissioner determines that the claimant's remaining limitations are disabling, then the Commissioner finds that the claimant is disabled, independent of his or her drug addiction or alcoholism, and that the claimant's addiction or alcoholism is not a contributing factor material to the determination of disability. *See* 20 C.F.R. §§ 404.1535(b)(2)(ii), 416.935(b)(2)(ii).

3. Chronic Fatigue Syndrome ("CFS") or Epstein-Barr Virus Syndrome

"Chronic fatigue syndrome ["CFS"] is a disease that did not become widely known in the medical community until 1988 when the first diagnostic article was published. It was also in 1988 that the CDC accepted chronic fatigue syndrome as a disease." *Reddick v. Chater*, 157 F.3d 715, 723 n.3 (9th Cir. 1998). "Chronic fatigue is defined as '*self-reported* persistent or relapsing fatigue lasting six or more consecutive months.'" *Id*. at 726 (emphasis in original) (quoting Centers for Disease Control, *The Chronic Fatigue Syndrome: A Comprehensive Approach to its Definition and Study*, 121 ANNALS OF INTERNAL MEDICINE 954 (1994)). Although CFS has many symptoms, "the presence of persistent fatigue is necessarily self-reported . . . [and a] final diagnosis is made 'by exclusion,' or ruling out other possible illnesses." *Reddick*, 157 F.3d at 726; *see also Sisco v. United States Dep't of Health & Human Servs*., 10 F.3d 739, 743-44 (10th Cir. 1993) (holding ALJ erred in rejecting diagnosis of CFS because of lack of "dipstick" laboratory test for CFS where no such test existed and it is instead diagnosed, in part, by excluding other possible disorders).

H. Witness Testimony

"In determining whether a claimant is disabled, an ALJ must consider lay witness testimony concerning a claimant's ability to work." *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.1993); 20 C.F.R. §§ 404.1513(d)(4) & (e), 416.913(d)(4) & (e)); *see also Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012) ("Lay testimony as to a claimant's symptoms or how an impairment affects the claimant's ability to work is competent evidence that the ALJ must take into

account."); *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009); *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2007). Lay testimony is competent evidence and cannot be disregarded without comment. *Molina*, 674 F.3d at 1114; *Stout*, 454 F.3d at 1053 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir.1996)). To discount lay witness testimony, the ALJ must give reasons germane to each witness. *Molina*, 674 F.3d at 1114; *Bruce*, 557 F.3d at 1115; *Carmickle*, 533 F.3d at 1164 (concluding ALJ had proper basis to reject lay witness testimony); *Stout*, 454 F.3d at 1053; *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("Lay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." (citations omitted)). The court has not, "however, required the ALJ to discuss every witness's testimony on a individualized, witness-by-witness basis. Rather, if the ALJ gives germane reasons for rejecting testimony by one witness, the ALJ need only point to those reasons when rejecting similar testimony by a different witness." *Molina*, 674 F.3d at 1114 (determining the ALJ erred where she gave reasons for rejecting claimant's testimony, but failed to provide a reason for disregarding the lay witness testimony either individually or in the aggregate, and holding that the error was harmless).

IV. Judicial Review

A. Jurisdiction

After a "final decision" by the Commissioner, judicial review of disability claims is authorized for the district courts. *See* 42 U.S.C. § 405(g). The court of appeals also has jurisdiction pursuant to 42 U.S.C. § 405(g) ("judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions") and 28 U.S.C. § 1291. Note that the denial of a motion to reopen a prior Social Security benefits determination is a discretionary decision that is not final, and thus generally not reviewable by a district court. *See Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir. 2008).

Section 405(g) has three requirements for judicial review: "(1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court." *See Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975). Section 405(h) "prevent[s] review of decisions of the Secretary save as provided in

the [Social Security] Act, which provision is made in § 405(g)." *Salfi*, 422 U.S. at 757.

B. Federal District Court

1. Standard of Review

The district court reviews the Commissioner's final decision under the substantial evidence standard; the decision will be disturbed only if it is not supported by substantial evidence or is based on legal error. *See* 42 U.S.C. § 405(g) ("findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive"); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). "'Substantial evidence' means 'more than a scintilla,' but 'less than a preponderance.'" *Smolen*, 80 F.3d at 1279 (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971) and *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)) (internal citations omitted); *see also Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009); *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

2. Pro Se Litigants

The court also has "an obligation where the petitioner is pro se . . . to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

3. Administrative Res Judicata

An unappealed denial of an application for disability benefits operates as res judicata as to the finding of non-disability through the date of the prior decision. Although applied less rigidly to administrative than to judicial proceedings, the principles of res judicata apply to administrative decisions. *See Vasquez v. Astrue*, 572 F.3d 586, 597 (9th Cir. 2009); *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988); *Gregory v. Bowen*, 844 F.2d 664, 666 (9th Cir. 1988).

A binding determination of non-disability also creates a presumption of continuing non-disability with respect to the period after the date of the prior decision. *See Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995); *Miller v. Heckler*,

770 F.2d 845, 848 (9th Cir. 1985); *Lyle v. Sec'y of Health & Human Servs.*, 700 F.2d 566, 568-69 (9th Cir. 1983); *see also Vasquez*, 572 F.3d at 597-98. The presumption does not apply, however, if there are "changed circumstances." *See Taylor v. Heckler*, 765 F.2d 872, 875 (9th Cir. 1985); *see also Vasquez*, 572 F.3d at 597 (explaining that presumption does not apply where the claimant raises a new issue, such as the existence of an impairment not considered previously). The presumption may be overcome by a showing of "changed circumstances," by new facts establishing a previously unlitigated impairment or other apparent error in the prior determination, or where the claimant's unrepresented status has resulted in an inadequate record. *See Lester*, 81 F.3d at 827-828; *see also Vasquez*, 572 F.3d at 597-98. Note that while this court has recognized a presumption of continuing non-disability where there is a prior finding of non-disability, it has not applied the same presumption to a prior finding of disability. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1172-73 (9th Cir. 2008).

In *Gregory*, this court held that res judicata could not be applied to bar Gregory's disability claim because she was not represented by counsel in her first application and, in her second application, she raised a psychological impairment not previously considered. *See Gregory*, 844 F.2d at 666. In *Chavez*, the claimant's 55th birthday and "attainment of 'advanced age' constitute[d] a changed circumstance" that precluded the application of res judicata to the first ALJ's finding of non-disability. *See Chavez*, 844 F.2d at 693. In *Lester*, res judicata was not appropriately applied because in the second application Lester alleged a mental impairment not raised in the first application (or addressed in the first denial) *and* Lester turned 50 shortly after the first denial. *See Lester*, 81 F.3d at 827-28. In *Vasquez*, the court determined that it was improper to apply a presumption of continuing non-disability when deciding Vasquez's second application, where Vasquez raised a new issue (mental impairment), and also entered into a new age category. *Vasquez*, 572 F.3d at 597-98. This court has also declined to apply res judicata where an ALJ considers, on the merits, whether a claimant had a disability during an already-adjudicated period. *Lewis v. Apfel*, 236 F.3d 503, 510 (9th Cir. 2001) ("When an ALJ de facto reopens the prior adjudication in that manner, the Commissioner's decision as to the prior period is subject to judicial review.").

4. Summary Judgment Standard[2]

Summary judgment is a method for the prompt disposition of an action in which there is no genuine issue of material fact. Fed. R. Civ. P. 56. Rule 56(c) provides for the granting of summary judgment where the moving party is entitled to judgment as a matter of law. The burden of establishing that there is no genuine issue of material fact lies with the moving party. *See Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). Once the moving party has met that burden by "presenting evidence which, if uncontradicted, would entitle it to a directed verdict at trial, [Fed. R. Civ. P. 56(e)(2)] shifts to [the nonmoving party] the burden of presenting specific facts showing that such contradiction is possible." *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978); *see also Nissan Fire*, 210 F.3d at 1102-03.

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. Rather, responses, either by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. A mere "scintilla" of evidence supporting the nonmoving party's position will not suffice. There must be enough of a showing that the jury could reasonably find for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The question in summary judgment motions is whether "reasonable minds could differ as to the import of the evidence." *See Eisenberg v. Insurance Co. of North Am.*, 815 F.2d 1285, 1288 (9th Cir. 1987) (internal quotations and citation omitted). "If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." *Id.* at 1288 (internal quotations and citation omitted). The nonmoving party's evidence is to be taken as true and all inferences are to be drawn in the light most favorable to the nonmoving party. *See id*. at 1289.

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[2] Most appeals to this court involving a denial of Social Security disability benefits are from a district court's grant of summary judgment.

5. Exclusion of New Evidence

a. Materiality of New Evidence

Although a district court may remand a case to the Commissioner for consideration of new evidence, it may do so only when the new evidence is material. *See Clem v. Sullivan*, 894 F.2d 328, 332 (9th Cir. 1990). Evidence is material "only where there is a reasonable possibility that the new evidence would have changed the outcome of the [Commissioner's] determination had it been before him." *Booz v. Sec'y of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984) (quotation marks and citation omitted); *see also* 42 U.S.C. § 405(g).

b. Good Cause Requirement

For a district court to order a remand, the plaintiff must also show "that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." *Booz v. Sec'y of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984) (quoting 42 U.S.C. § 405(g)); *see also Van v. Barnhart*, 483 F.3d 600, 605 & n.4 (9th Cir. 2007). In *Booz*, the court found good cause for Booz's failure to present the evidence to the ALJ because of Booz's limited financial means and his inability to afford a qualified medical specialist to review his records within the time allotted by the ALJ. *Booz*, 734 F.2d at 1380. In *Booz*, the court noted that "[i]n Social Security cases the ALJ has a special duty to fully and fairly develop the record and to assure that . . . claimant's interests are considered." *Booz*, 734 F.2d at 1381 (quoting *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)); *see also* 42 U.S.C. § 405(g).

6. Attorneys' Fees

a. 42 U.S.C. § 406

The district court and the court of appeals may award fees under 42 U.S.C. § 406(b)(1) ("Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment … ."). "[A]n award under § 406(b) compensates an attorney for all the attorney's work before a federal court on behalf of the Social Security claimant in connection with the action that resulted in past-due benefits." *Parrish v. Comm'r of Soc. Sec. Admin.*, 698 F.3d 1215-20 (9th Cir. 2012). While 42 U.S.C. § 406(b) governs the award and

collection of fees for representation of claimants in court, 42 U.S.C. § 406(a) governs the award and collection of attorney's fees for the representation of Social Security claimants in proceedings before the Administration. *Clark v. Astrue*, 529 F.3d 1211, 1214 (9th Cir. 2008). This court has held that § 406(b) only limits the amount of attorney's fees awarded under § 406(b), not the combined fees awarded under § 406(a) and § 406(b). *See Clark*, 529 F.3d at 1218.

The district court's award of attorneys' fees under 42 U.S.C. § 406(b)(1) is reviewed under an abuse of discretion standard. *See Crawford v. Astrue*, 586 F.3d 1142, 1146-47 (9th Cir. 2009); *Clark*, 529 F.3d at 1214; *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998) (order).

For attorneys' fees pursuant to 42 U.S.C. § 406(b)(1), the claimant carries the burden of producing "satisfactory evidence," in addition to her attorney's own affidavits, that the requested rates comport with "'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *See Widrig*, 140 F.3d at 1209-10 (quoting *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984)). Unlike a "fee-shifting" statute, which requires the losing party to pay the prevailing party's attorneys' fees, § 406(b)(1) deals with the amount a prevailing plaintiff must pay his attorney. *See Widrig*, 140 F.3d at 1210-11; *see also Crawford*, 586 F.3d at 1147; *Straw v. Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989). Congress passed the statute to limit contingency fees and avoid inordinate deprivations of disability benefits. *See Straw*, 866 F.2d at 1169. This court has recognized that it is inappropriate for "victorious claimants to 'subsidize' the claims of losing claimants [by taking] large portions out of disabled people's recoveries to fund the representation of other claimants." *Id.* at 1171. Section 406(b)(1) "strikes a balance between encouraging lawyers to represent disability claimants, and protecting the already inadequate stipend most claimants receive." *Allen v. Shalala*, 48 F.3d 456, 460 (9th Cir. 1995), *abrogated by Gisbrecht v. Barnhart*, 535 U.S. 789 (2002); *see also MacDonald v. Weinberger*, 512 F.2d 144, 146-47 (9th Cir. 1975).

In *Gisbrecht*, the Supreme Court held that in conducting the fee analysis the court should begin with the contingent fee agreement, and then test it for reasonableness. 535 U.S. at 808-09; *see also Social Security Practice Guide* § 27.03 (2010).

Note that while the § 406(b) fee is limited to 25% of the past-due benefits, this court has held that no similar limit applies to § 406(a) fees. *See Clark*, 529 F.3d at 1215.

Federal courts have no jurisdiction to review attorney fees awarded by the Social Security Administration; pursuant to 42 U.S.C. § 406(a), the Commissioner alone has the authority to award fees for representation of a claimant in an administrative proceeding. *See MacDonald*, 512 F.2d at 146; *see also Clark*, 529 F.3d at 1215 ("Section 406(a) grants the Social Security Administration exclusive jurisdiction to award attorney's fees for representation of a Social Security claimant in proceedings before the Administration.").

b. Equal Access to Justice Act

Under the Equal Access to Justice Act ("EAJA"):

> a court shall award to a prevailing party other than the United States fees and other expenses . . . , incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A); *see also Hardisty v. Astrue*, 592 F.3d 1072, 1076 (9th Cir. 2010). "[F]ees and other expenses" include "reasonable attorney fees." 28 U.S.C. § 2412(d)(2)(A). Under the EAJA, attorney's fees are set at the market rate, but capped at $125 per hour. *See id.* The statute explicitly permits the court, in its discretion, to reduce the amount awarded to the prevailing party to the extent that the party "unduly and unreasonably protracted" the final resolution of the case. 28 U.S.C. §§ 2412(d)(1)(C), 2412(d)(2)(D). "[I]f a court awards attorney fees under § 2412(d) for the representation of a Social Security claimant on an action for past-due benefits, and also awards attorney fees under § 406(b)(1) for representation of the same claimant in connection with the same claim, the claimant's attorney 'receives fees for the same work' under both § 2412(d) and § 406(b)(1) for purposes of the EAJA savings provision," and the court must offset the EAJA award against the SSA award. *Parrish v. Comm'r of Soc. Sec. Admin.*, 698 F.3d 1215, 1221 (9th Cir. 2012). Note that the court of appeals, in addition to the district court, is authorized by EAJA to award attorney fees and costs to the claimant. *See Orn v. Astrue*, 511 F.3d 1217, 1218-20 (9th Cir. 2008) (order).

The district court's denial of attorneys' fees under EAJA is reviewed under an abuse of discretion standard. *See Le v. Astrue*, 529 F.3d 1200, 1201 (9th Cir. 2008); *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996).

If no reasonable basis in law and fact exists for the government's position with respect to the issue on which the court based its remand, EAJA fees are warranted. *See Flores v. Shalala*, 49 F.3d 562, 569-71 (9th Cir. 1995) (government's position not substantially justified when ALJ failed to consider a relevant vocational report); *see also Hardisty*, 592 F.3d at 1079; *Lewis v. Barnhart*, 281 F.3d 1081, 1085 (9th Cir. 2002). "Whether the claimant is ultimately found to be disabled or not, the government's position at each stage must be 'substantially justified.'" *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998); *see also Shafer v. Astrue*, 518 F.3d 1067, 1071 (9th Cir. 2008) (concluding that government's defense of the ALJ's procedural errors was not substantially justified); *Lewis*, 281 F.3d at 1085. If the claimant wins at any intermediate stage of the proceedings, he is considered a "prevailing party" for EAJA purposes even though there may not have been an ultimate disposition of the disability claim. *See Corbin*, 149 F.3d at 1053.

The fourth sentence of 42 U.S.C. § 405(g) provides that "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." A "sentence four" remand should result in entry of a final judgment by the district court, at which point the claimant is a prevailing party. *See Shalala v. Schaefer*, 509 U.S. 292, 302 (1993).

EAJA limits the amount of time that a claimant may file a fee application. *See Van v. Barnhart*, 483 F.3d 600, 605-07 (9th Cir. 2007) (in case involving a sentence-six remand, the court discusses timeliness of EAJA application). Under 28 U.S.C. § 2412(d)(1)(B), "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party … ." *Id.*; *see also Van*, 483 F.3d at 604. Thus, for a fee application to be timely, the application must be filed "within 30 days after a judgment that is final and not appealable." *Van*, 483 F.3d at 604 (internal quotation marks and citation omitted).

C. Court of Appeals

1. Standard of Review[3]

This court reviews de novo the district court's order. *See Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010); *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). The court's "review of the Commissioner's decision is 'essentially the same as that undertaken by the district court.'" *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999) (quoting *Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985)). The statute itself reads: "The judgment of the [district] court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." 42 U.S.C. § 405(g).

However, "when a district court remands a disability benefits case to the Social Security Administration pursuant to sentence four of 42 U.S.C. § 405(g), its decision whether such a remand is for further proceedings or for an immediate payment of benefits is reviewable for abuse of discretion rather than de novo." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000).

Like the district court, this court reviews the Commissioner's final decision under the substantial evidence rule. *See Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). This court may set aside the denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. *See Berry*, 622 F.3d at 1231; *Flaten*, 44 F.3d at 1457. The decision must be affirmed if substantial evidence supports the ALJ's findings and the ALJ applied the correct legal standards. *See Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam).

Substantial evidence means more than a mere scintilla, but less than a preponderance. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *see also Young v. Sullivan*, 911 F.2d 180, 183 (9th Cir. 1990). It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Orn*, 495 F.3d at 630. "If the evidence can reasonably support either affirming or reversing the [Commissioner's] conclusion, the court may not substitute its judgment for that of the [Commissioner]." *Flaten*, 44 F.3d at 1457; *see also Orn*, 495 F.3d at 630. However, the Commissioner's decision cannot be affirmed

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[3] The appropriate standard of review is discussed in more depth in the *Ninth Circuit Court of Appeals Standards of Review* outline.

"simply by isolating a specific quantum of supporting evidence." *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989) (internal quotation marks and citation omitted); *see also Orn*, 495 F.3d at 630. The record as a whole must be considered. *See Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986). This court reviews "only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely." *Orn*, 495 F.3d at 630.

Note that "[a] decision of the ALJ will not be reversed for errors that are harmless." *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (citing *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991)); *see also Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) ("[T]he court will not reverse the decision of the ALJ's decision for harmless error, which exists when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability determination." (internal quotation marks and citation omitted)); *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006). To determine whether an error is harmless, the court will "look at the record as a whole to determine whether the error alters the outcome of the case." *Molina*, 674 F.3d 1115-16 (discussing harmless error principles and providing examples where errors were found to be harmless).

2. Waiver

A failure to raise an argument before the Social Security Appeals Council does not waive that argument in district court. *See Sims v. Apfel*, 530 U.S. 103, 112 (2000) ("Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues.").

When an issue is not raised before the district court, it has been waived on appeal to this court. *See Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (per curiam). Claimants may, however, raise new issues on remand before the ALJ. *See Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9th Cir. 1990); *see also* 20 C.F.R. §§ 404.946(b)(1), 416.1446(b)(1).

3. Substitution of the Current Commissioner

The current Commissioner of Social Security is the proper defendant-appellee. The named defendant-appellee in federal court has been, historically, the Secretary of Health and Human Services (*e.g.*, Shalala, Sullivan, Bowen, Heckler, Schweiker, and Harris). Effective March 31, 1995, however, pursuant to Pub. L.

No. 103-296, 108 Stat. 1464, 42 U.S.C. §§ 901-904, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security cases was transferred to the Commissioner of the Social Security Administration (*e.g.*, Apfel, Callahan, Chater, Barnhart, and Astrue). In accordance with § 106(d) of the Act, the Commissioner of the Social Security Administration, was substituted for the Secretary.

Because the *current* Commissioner of Social Security Administration is the proper defendant-appellee it is always appropriate to substitute him or her pursuant to Fed. R. App. P. 43(c)(2) and Fed. R. Civ. P. 25(d). A sample footnote to follow the caption is:

> Carolyn W. Colvin, Acting Commissioner of Social Security, is substituted for her predecessor, Michael J. Astrue, Commissioner of Social Security, pursuant to Fed. R. App. P. 43(c)(2).

4. Disposition

"The decision whether to remand a case for additional evidence, or simply to award benefits is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987); *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985); *see also Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990) (noting that the court has the "discretion to remand so that the Secretary may further develop the record" but invoking its discretion to order payment of benefits because the claimant was then 64 years old, had applied for benefits almost four years prior to the decision, and "further delays at this point would be unduly burdensome").

When this court is convinced that substantial evidence does not support the Commissioner's decision, it may reverse and remand for payment of benefits. *See Sprague*, 812 F.2d at 1232. This court may properly order the award of benefits to a claimant when the record is fully developed, the treating physician's opinion justifies the award of such relief, and the ALJ has improperly disregarded the opinion of the claimant's treating doctor without giving legitimate reasons for doing so. *See Ghokassian v. Shalala*, 41 F.3d 1300, 1304 (9th Cir. 1994); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990) (remanded for payment of benefits after holding that there had been legal error and substantial evidence did not support the Secretary's decision because the ALJ had failed to advance any legitimate reasons for disregarding the examining physicians' medical findings, reports, and opinion); *see also Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir. 2007)

(directing award of benefits where the ALJ provided legally insufficient reasons for rejecting the claimant's testimony, and it was clear from the record that the ALJ would be required to determine the claimant was disabled if the testimony was credited). *Cf. Luna v. Astrue*, 623 F.3d 1032, 1035 (9th Cir. 2010) (concluding that "further consideration of the factual issues was appropriate to determine whether the outcome of the first application should have been be different."); *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (explaining that the court was not required to enter award of benefits where the findings were insufficient as to whether testimony should be credited as true, and remanding for reconsideration of credibility).

This court has also directed the award of benefits where "no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed." *Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988); *see also McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002). This is a recognition of the "need to expedite disability claims." *Varney*, 859 F.2d at 1401; *see also Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996) (noting that remand for payment of benefits is proper when no outstanding issues need to be resolved before a determination of disability can be made); *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1988) (because the court found that substantial evidence did not support the ALJ's findings disbelieving the treating physician, and the court accepted the treating physician's opinion, the court ordered the payment of benefits).

Publications

Carolyn A. Kubitschek, *Social Security Disability: Law and Procedure in Federal Court*, Thomson/West (2013).

Harvey L. McCormick, *Social Security Claims and Procedure*, West Group (Sixth Edition, Updated 2012).

Joseph L. Matthews & Dorothy Matthews Berman, *Social Security, Medicare and Pensions*, Nolo Press (Eighteenth Edition, 2013).

Web Sites

National Organization of Social Security Claimants and Representatives: http://www.nosscr.org

The Social Security Administration's homepage: http://www.ssa.gov/

The Social Security Administration's Region 9 homepage: http://www.ssa.gov/sf/